

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
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No. 89-1964

October Term, 1989

MENATSAGAN MELIKIAN and
KAMBIZ AFTASSI,

Petitioners

v.

ANTHONY CORRADETTI; MORRIS COPPERSMITH;
RUBIN BERNSTEIN; BERNARD WEINSTEIN;
CORRADETTI ENTERPRISES, INC., t/a
ANTHONY SALES; ANTHONY ASSOCIATES, INC.;
R.A.M. PACKAGING; MEMCO TRADING CO., INC.;
PHILBER SALES CORPORATION, t/a BERNIE
WEINSTEIN; ANTHONY EXPORTING CO., INC.,

Respondents

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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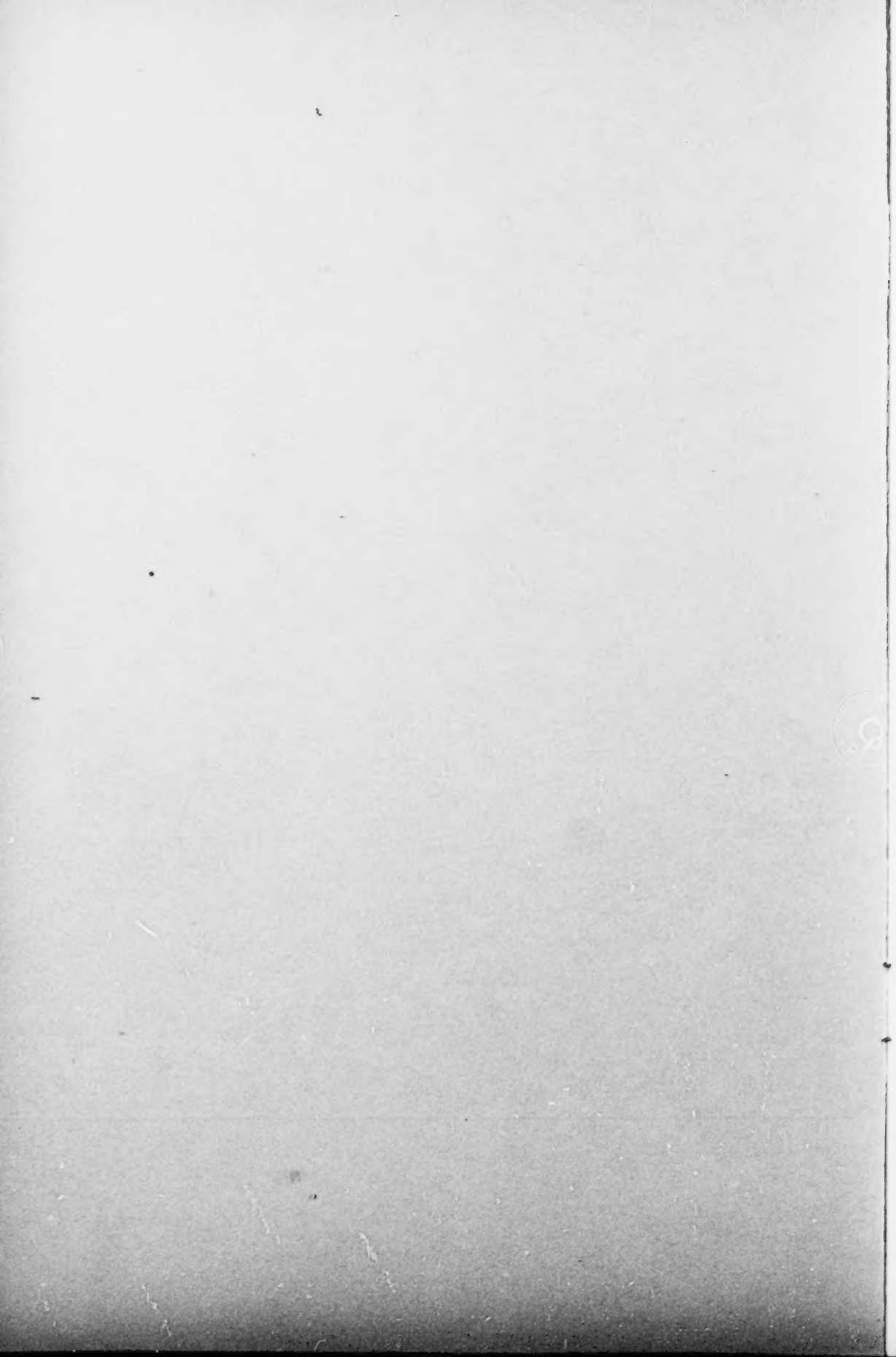


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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly affirmed the District Court's dismissal of the complaint.

Whether the District Court Judge properly refused to recuse himself.

PARTIES

Petitioners are plaintiffs below. Menatsagan Melikian is appearing *pro se*. Although Kambiz Aftassi is listed as a petitioner, he has not actually joined in the petition by appearing either *pro se* or through counsel. Further, the petition also improperly identifies the Honorable Stanley S. Brotman, U.S.D.J., as a respondent even though he was not named as a party to these proceedings below.

Respondents are Anthony Corradetti; Morris Coppersmith (deceased); Rubin Bernstein; Bernard Weinstein; Corradetti Enterprises, Inc. t/a Anthony Sales; Anthony Associates, Inc.; R.A.M. Packaging; Memco Trading Co.; Philber Sales Corporation t/a Bernie Weinstein; and Anthony Exporting Co., Inc.¹ The corporate defendants are not subsidiaries of nor do they have parent companies who are not parties named herein.

COUNTERSTATEMENT OF THE CASE

Respondents accept the first two paragraphs of petitioner's statement of the case and add the following.

1. This brief is filed by counsel representing Anthony Exporting Co., Inc., Anthony Associates, Inc., Morris Coppersmith, Rubin Bernstein, and Memco Trading Co., Inc. Respondents Anthony Corradetti, Corradetti Enterprises, Inc., t/a Anthony Sales and R.A.M. Packaging, through their respective counsel, also join in this brief. Respondants Bernard Weinstein and Philber Sales Corporation t/a Bernie Weinstein will file a separate brief through their own counsel.

In a decision published at 791 F.2d 274 (3rd Cir. 1986) (Pet. App. A), the Court of Appeals reversed the trial court's order dismissing the complaint and remanded the matter back to the trial court.²

The relevant history of the case in the District Court after the remand is particularized by Magistrate Jerome B. Simandle in his Report and Recommendation filed June 1, 1989 (Pet. App.).³ In sum, Melikian, after filing notice that he was representing himself *pro se*, made several attempts to have Judge Brotman recuse himself and simultaneously refused to obey numerous orders of the court. On two separate occasions, Melikian, and Aftassi, through his then-counsel, Daniel B. Zonies, Esquire, unsuccessfully sought interlocutory review of Judge Stanley S. Brotman's orders denying their requests for his recusal.

As Magistrate Simandle's Report and Recommendation outlines in greater detail, Melikian and Aftassi's refusal to obey scheduling and discovery orders issued by the court culminated in their refusal to participate in the pretrial conference procedure just prior to the trial which was scheduled for June 5, 1989 (Pet. App. , Report pp. 5-6, 12). On May 15, 1989, Melikian, in a letter to Judge Brotman, again demanded that the Judge recuse himself and stated that he would "defy the court's

2. The trial court's dismissal of the Complaint as against Anthony Exporting Co., Inc., was affirmed, however.

3. Petitioners have failed to comply with the directive of the Clerk of this Court to supplement their appendix with Magistrate Simandle's Report and Recommendation ("Report"), Judge Brotman's Opinion, filed June 23, 1989, accepting the Report ("Opinion"), and Judge Brotman's Order dismissing the complaint with prejudice filed the same date ("Order"). Consequently the Clerk has directed Respondents to file one photocopy of these papers with the Court, and to refer to their page numbers when citing to specific pages of those documents.

orders" by refusing to participate in any further discovery proceedings, the final pretrial conference or the trial (Pet. App. , Report pp. 10-11).

As promised, Melikian refused to attend the pretrial conference on May 22, 1989. Although Mr. Zonies did appear, he represented that he had been instructed by his client, Aftassi, not to participate and stood "mute" (Pet. App. , Report p. 12).

As a result of Melikian and Aftassi's willful defiance of the court's orders to proceed, Magistrate Simandle filed a Report and Recommendation with Judge Brotman which carefully recounted petitioners' transgressions and the trial court's efforts to deal fairly with petitioners. The Report ultimately recommended that Judge Brotman dismiss the complaint with prejudice (Pet. App. , Report p. 31). Although the Report expressly advised petitioners' of the right to file an objection to the Recommendation (Pet. App. , Report pp. 31-33), neither Melikian nor Aftassi chose to do so (Pet. App. , Opinion p. 4).

Melikian refused to appear at the trial on June 5, 1989, and again Mr. Zonies represented to the court that Aftassi had instructed him not to proceed with the case. Judge Brotman then issued an Opinion and an Order, both filed June 23, 1989, accepting the Report and Recommendation of Magistrate Simandle and dismissing the complaint with prejudice (Pet. App.).

Having obtained a final judgment through the dismissal of their action, petitioners then appealed to the United States Court of Appeals for the Third Circuit (Case No. 89-5588). There, they argued that Judge Brotman improperly failed to recuse himself as a result of the Third Circuit's May 28, 1986 opinion reversing the order granting defendants' initial motion to dismiss the complaint and remanding the matter back to the trial court.

The three judge panel of the Third Circuit issued a Judgment Order dated December 21, 1989 affirming the

judgment of the District Court dismissing the complaint (Pet. App. B). Petitioners' request for a hearing *in banc* was denied on January 23, 1990 (Pet. App. C).

SUMMARY OF ARGUMENT

The Court of Appeals did not err in affirming the judgment of the district court dismissing the complaint, based upon the findings of fact and law set out in the Report and Recommendation of Magistrate Simandle, to which petitioners never objected. As the Report shows, the trial court gave petitioners every opportunity to cure their repeated failures to abide by court orders, and was left with no choice but to dismiss the case in view of petitioners' avowed defiance of the trial court's orders.

Moreover, there was never any basis for Judge Brotman to have recused himself. The only reason petitioners articulate in support of that claim was that the Third Circuit reversed and remanded Judge Brotman's initial order granting defendants' motion to dismiss the complaint; the Third Circuit's opinion clearly did not create any grounds for Judge Brotman to recuse himself.

ARGUMENT

Initially, it is apparent that there are no issues present which would justify granting the petition for writ of certiorari. Rule 10 of this Court sets forth the general reasons which this Court will consider in deciding whether to grant a petition for writ of certiorari. In a case from the United States Court of Appeals, this Court looks to whether the decision rendered by the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter, or whether the Court of Appeals has decided a federal question in conflict with a state court of last resort, or whether the Court of Appeals has so far departed, or affirmed such a departure by a lower court, from the accepted and usual course of

judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Sup.Ct.R.10.1(a). Although the Rule advises that these factors are not exhaustive, the issues raised by the petition do not call any of the factors highlighted by the Rule into play nor do they merit further consideration by this Court on any other grounds.

A. The Court of Appeals Correctly Affirmed the Trial Court's Dismissal of the Complaint.

The petitioners' long, willful and determined journey to the point where the trial court had no alternative but to dismiss their complaint was summarized above. However, since the trial court's very justification for its action lies with the cumulative conduct of the petitioners, a full appreciation of the problems confronting the trial court cannot be gained without reviewing the Report and Recommendation issued by Magistrate Simandle. For the sake of brevity, those findings will not be repeated at length here.

The trial Court may exercise its discretion and select dismissal of the matter as the appropriate sanction after considering all relevant circumstances. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The trial court very carefully balanced the factors set forth in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984) in determining that it was necessary to dismiss petitioners' case:

- (1) the extent of the party's personal responsibility;
- (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) a *history* of dilatoriness;
- (4) whether the conduct of the party or the attorney was *willful* or in *bad* faith;
- (5) the effectiveness of sanctions other than dismissal which entails an analysis of

alternative sanctions and (6) the meritoriousness of the claim or defense. [emphasis in original] —

Petitioners' refusal to go forward with the proceedings in the trial court, assertedly on the basis that Judge Brotman improperly refused to recuse himself was nothing but a bold attempt to manipulate judicial proceedings in order to reach the Third Circuit Court of Appeals, in anticipation of that court holding that Judge Brotman should have recused himself. It was, as Magistrate Simandle concluded, "the product of calculation and intentionality, and it is not done by inadvertence or neglect; the conduct is of sufficient culpability to fully warrant dismissal of plaintiffs' case." (Pet. App. , Report p. 24). As a result, Magistrate Simandle recommended that petitioners' case be dismissed pursuant to Fed.R.Civ.P. 16(f) and 37(b)(2)(C)⁴. Petitioners never objected to the Report and Recommendation.

The only grounds on which petitioners rely to seek this Court's review is their claim that Judge Brotman improperly failed to recuse himself.

B. Judge Brotman Did Not Err in Refusing to Recuse Himself.

Petitioners argue that the Third Circuit's decision in *Melikian v. Corradetti*, 791 F.2d 274 (3rd Cir. 1986) reversing Judge Brotman's Order granting defendants' Motion to dismiss the Complaint (except as to defendant Anthony Exporting Co., Inc. on which point Judge Brotman was affirmed) required that he recuse himself from the case following remand. That proposition is plainly without merit. Clearly, an inference that a judge's impartiality might reasonably be questioned is not raised by the fact that a judge made a judicial decision which is deemed erroneous by a higher court.

4. The pertinent language is quoted in the Report and Recommendation at Pet. App. , Report, pp. 14-16.

See United States v. Hollis, 718 F.2d 277 (8th Cir. 1983) *cert. denied* 465 U.S. 1036 (1984); and *Mayberry v. Maroney* 558 F.2d 1159 (3rd Cir. 1977)


Indeed, where grounds for recusal do not exist, a judge is obligated *not* to recuse himself. *Suson v. Zenith Radio Corp.*, 763 F.2d 304 (7th Cir. 1985). Plainly, Judge Brotman correctly denied petitioners' demands for recusal.

Conclusion

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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